IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS JANUARY 9, 2008

CORNELIUS L. POLK V. MARCIE A. DENNEY

An Appeal from the Maury County Juvenile Court
No. 63-462 George L. Lovell, Judge

No. M2006-00670-COA-R3-JV - Filed July 28, 2008

This appeal involves the juvenile court's dismissal of a petition for custody of a child. After years of litigation regarding the child's custody, the appellant putative father filed a petition for custody, alleging serious deficiencies in the mother's care of the child. The mother then questioned the putative father's paternity, and the parties entered into an agreed order to allow genetic paternity testing. The test showed that the appellant was not the father of the minor child. The appellant then filed a paternity petition. Based on the results of the DNA test, the juvenile court found that the appellant was not the biological father, dismissed his petition for custody, and terminated the appellant's right to visitation and other non-custodial parental rights. The appellant appeals. We affirm the finding that the appellant is not the biological father. We reverse the dismissal of his petition for custody, finding that the juvenile court retained jurisdiction over the child as a dependent and neglected child, and erred in failing to hear evidence on the appellant's allegations regarding the mother's care of the child. In addition, we reverse the remainder of the trial court's decision because the record does not indicate that the mother had requested termination of the appellant's visitation and other non-custodial parental rights.

Tenn. R. App. P. 3; Judgment of the Juvenile Court is Affirmed in Part, Reversed in Part, and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J. joined; W. FRANK CRAWFORD, J., did not participate.

C. LeAnn Smith, Nashville, Tennessee, for the Plaintiff/Appellant, Cornelius L. Polk.

Defendant/Appellee Marcie A. Denney, *pro se* (no brief filed).

OPINION

The minor child at issue in this case, C.L.D., was born on August 1, 1994 to Defendant/Appellee Marcie A. Denney ("Mother"). The putative father of C.L.D. is Plaintiff/Appellant Cornelius Lavaughn Polk ("Polk").

On September 19, 1994, when C.L.D. was just over a month old, the Department of Children's Services ("DCS") filed a petition asserting that C.L.D. was dependent and neglected, alleging that C.L.D. and Mother were living in an unsanitary two-bedroom trailer with no electricity, along with six to ten other adults. DCS sought to bring C.L.D. into protective custody. On September 23, 1994, an order of temporary custody was entered placing physical custody of C.L.D. with Polk, pending a hearing. Following that hearing, the trial court placed physical custody of the child with Polk and Polk's grandmother, Olivia Sparkman ("Sparkman"). Legal custody remained with DCS. This court proceeding marked the beginning of years of litigation among Mother, Polk, and Sparkman regarding custody of C.L.D.

DCS conducted a home study of Mother's home and of Sparkman's home. Thereafter, in November 1994, an order was entered removing legal custody of C.L.D. from DCS and placing legal joint-custody with Polk and Sparkman.

In January 1995, Mother filed a petition with the juvenile court, requesting that legal custody be returned to her. After a hearing, the trial court left custody of C.L.D. with Polk and Sparkman, but granted Mother visitation.

In November 1995, Mother again petitioned for custody of C.L.D., asserting that she had married, was employed, and could now provide a stable home for C.L.D. In December 1995, after a hearing, the trial court granted joint custody to Polk and Mother, and removed Sparkman as a custodian.

In January 1996, the trial court entered an order, indicating that Mother had alleged to the trial court that Polk was no longer living with Sparkman, and that Polk had allegedly "gone wild," prompting Sparkman to call the police. The order suspended Polk's joint custody and visitation pending further hearing. In April 1996, Polk filed a petition for custody of C.L.D., alleging that Mother was not properly caring for her. Polk's petition stated that, if he were granted custody, he and C.L.D. would be living with Sparkman. In August 1996, Polk was granted visitation with C.L.D., but custody apparently remained with Mother.

In May 1997, Polk filed a petition alleging that Mother had brought C.L.D. to Sparkman's home "sick, hungry, dirty, and upset," and had told Sparkman that she would leave C.L.D. with Polk if Polk would drop his petition against her.[1] Polk's petition asserted his belief that the child had been neglected and sexually abused. Temporary custody of C.L.D. was placed with Sparkman. In August

[1]Presumably, this is a reference to Polk's April 1996 petition for custody.

1997, Polk filed another petition for custody, alleging that Mother was in jail. At that point, temporary custody of C.L.D. was placed with Polk.

In October 1997, Mother filed a petition with the trial court, seeking to have custody of C.L.D. returned to her. In February 1998, Sparkman filed a competing petition seeking legal custody of C.L.D. In her petition, Sparkman asserted that the child had been living primarily with her, and that Polk did "not contribute support, [was] rarely at home, render[ed] no care toward the child & appear[ed] to be involved with drugs. . . . " In early March 1998, Mother petitioned the court for visitation. All of these petitions were heard on March 30, 1998. After the hearing, the trial court entered an order granting Sparkman custody of the child, granting visitation to Mother and to Polk, and requiring Mother and Polk to each pay $50 per week in child support. Subsequently, both Mother and Polk failed to timely pay their child support obligations, and wage assignments were entered against both in the summer of 1998.

In January 1999, Sparkman filed two petitions against Mother, alleging that Mother had quit her job, was not complying with the previous order of support, smoked in the presence of the child (who was asthmatic), and did not provide the child with nutritious food. In February 1999, the trial court discontinued Mother's visitation, pending further hearing.

In September 1999, Sparkman filed another petition against Mother. The petition indicated that "[s]ince [Mother's] release from Marshall Co. Jail[, she] has still not paid any child support." In November 1999, Sparkman filed a petition to modify support against Polk, seeking to increase Polk's child support obligation on the grounds that he had been "promoted to manager and should be capable of paying more child support. . . ." In December 1999, after a hearing, the trial court entered an order increasing Polk's support obligation.

In August 2002, Polk petitioned the trial court to return custody of C.L.D. to him, asserting that Sparkman had been hospitalized. In late August 2002, sole custody was granted to Polk.

In January 2003, the trial court entered an order granting joint custody of C.L.D. to Polk and his then-girlfriend, Samantha Dahlgren. The trial court's order states that C.L.D. "[h]as formed a bond with Samantha Dahlgren and . . . taking [C.L.D.] away from Samantha Dahlgren would not be in [the child's] best interest." Polk and Dahlgren have since married.

In February 2004, Mother petitioned the trial court to return custody of C.L.D. to her. In March 2004, the trial court entered an order granting visitation to Mother, but keeping custody of the child with Polk and Dahlgren.

In July 2004, Mother filed another petition asking the trial court to return custody of C.L.D. to her. In the petition, Mother stated that "[C.L.D.] just spent her week with me and things went very well. I believe all things are correct in my life for me to finally have my daughter returned to me." At that point, Mother was living in Cincinnati, Ohio. After hearing testimony on Mother's custody

petition, on November 4, 2004, the juvenile court entered an order summarizing C.L.D.'s history before the court:

> From the testimony of witnesses and the very lengthy Court record involving this matter, the Court finds that:
>
> 1. Since the child's birth, the parties have not been proper custodians of the child, due to their young ages and apparent immaturity. A great deal of the child's young life was spent in the care of her paternal grandmother [Sparkman], who is no longer physically able to provide that care. During that time, Cornelius Polk had custody for some brief times, until his mother [Sparkman] would return to court and show that he was not properly caring for the child.
> 2. Cornelius Polk has recently had nominal custody, but that his girlfriend [now wife], Samantha Dahlgren, was the primary caregiver during that time, and was the exclusive caregiver during the several times when they were not living together; thus the Court finds that he had abdicated his responsibility toward his child.
> 3. Until recently, [Mother] has not had the stability or resources to be considered as a possible placement for the child. That situation seems to have improved as she is living on her own now in the Cincinnati, Ohio area, has suitable housing and steady employment.

The November 4, 2004 order granted primary custody to Mother, and granted Polk visitation as well as the rights enumerated in Tennessee Code Annotated § 36-6-110, "as a non-custodial biological parent."

In May 2005, Mother filed a petition asking the trial court to review the case. Mother alleged that Polk had been coaching C.L.D. to keep secrets from Mother and "act out" in Mother's custody, so that custody would be returned to him. After a hearing, the trial court denied Mother's petition.

On October 4, 2005, Polk filed a petition, alleging a material change in circumstances, and asking the trial court to grant custody of C.L.D. to him. In the petition, Polk asserted that:

> a. Mother fails to provide adequate clothing, sanitary conditions, food, sleeping arrangements, supervision and nurturing to the parties' minor child;
> b. Mother prohibits Father from directly contacting the minor child;
> c. Mother leaves the minor child with various persons for several days at a time as suits her convenience and schedule;
> d. Since the child's return to the custody of the Mother, the minor child has failed in her educational goals. Specifically, the child was retained in the third grade and she was required to attend summer

> school. However, the Mother withdrew the minor child from her classes during the summer of 2005. The child is now behind her appropriate class.
> e. The minor child has suffered emotionally due to the upheaval in her life by taking her away from all of her family and friends. It is the child's preference to return to the custody of the Father.
> f. Mother drinks alcohol in excessive amounts and becomes verbally abusive;
> g. Father fears that the child will be irreparably harmed unless [s]he is removed from Mother and returned to a structured and nurturing home environment with Father.

Apparently, after Polk filed his petition, Mother began to question whether he was C.L.D.'s biological father. Subsequently, on January 11, 2006, an "Agreed Order" was entered. In relevant part, the order states:

> 1. The parties agree that the record does not contain an order of paternity with respect to the Plaintiff ("Father") and the subject minor child, [C.L.D.] and that no paternity test (DNA or otherwise) has been previously ordered or otherwise administered as regarding the child and the Plaintiff. The Mother now questions the paternity of this child. Therefore, the parties agree that a DNA paternity test should be administered to determine the paternity of the child. . . .

Thus, the parties agreed to a DNA test to determine if Polk was C.L.D.'s biological father. The Agreed Order was signed by the attorneys for both parties.

The ensuing DNA test showed that Polk is not the biological father of C.L.D.

Despite the results of the DNA test, on March 17, 2006, Polk filed a motion asking the trial court "to determine parentage of [C.L.D.]." He asserted the following grounds:

> 1. The minor child is now almost twelve (12) years of age.
> 2. The minor child has considered the Petitioner her father since birth.
> 3. During the [] pending case for custody, Marcie Denney, the mother of the minor child (hereinafter referred to as "Respondent"), requested genetic testing. The results of said DNA testing proved that Petitioner is not the biological father of the minor child.
> 4. During this case's long history, Petitioner has voluntarily acknowledged in open court that the minor child was his biological child. At various times, Petitioner has had custody of the minor child. At other times, Petitioner was ordered to pay child support.

> 5. Petitioner avers that Respondent is estopped from denying that the Petitioner is the biological father of the minor child. The delay during which the Respondent slept on her rights must of necessity have operated to prejudice Petitioner. . . .

Polk's petition maintained, on the grounds of *res judicata*, that Mother should not be allowed to deny that he is C.L.D.'s father.

A hearing on Polk's petition was held on March 20, 2006. The appellate record does not contain a transcript of the March 20, 2006 hearing. The record does, however, contain a Statement of the Evidence, pursuant to Rule 24(c) of the Tennessee Rules of Appellate Procedure. The Statement of the Evidence states, in pertinent part:

> At the hearing, no evidence was taken, other than the statements of counsel and an announcement by counsel that a DNA parentage test revealed that [Polk] is not the biological parent of the child. The Court also took judicial notice of the Court file relating to the child. Based on the test result, the Court dismissed the parentage action. In the custody action, the Court dismissed the Petitioner's custody claim because he is not the father of the child and because Tennessee is not the home state of the child, Respondent having been awarded custody of the child on July 30, 2004, and having lived in Ohio since before that date up to the present.
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> * * *
>
> In all of these actions [alleging C.L.D. was dependent and neglected, or seeking custody, visitation, or child support], it seems as though everyone assumed that [Polk] was the natural father because he was named as the father in all pleadings in which a father's name was included. Until the Motion to Determine Parentage was filed, that issue had never been raised or litigated. . . .
>
> The Court was called on to determine the child's parentage. The Court concluded that Cornelius L. Polk is not the father. Whether there are other arguments which would give Petitioner rights to the child have neither been plead nor argued.

By Order of March 31, 2006, the trial court found that:

> 1. Petitioner Cornelius Lavaughn Polk is not the biological father of the minor child.
> 2. The matter of parentage of this child has never been brought before this Court or any other Court. Therefore, the matter is not *res judicata*.

> 3. The Respondent is not estopped and has not waived any rights with respect to the question of Petitioner's parentage of the subject child.
>
> WHEREFORE, the Petitioner's Petition for Change in Custody and Motion to Determine Parentage are not well taken and same are hereby DENIED and DISMISSED.

Thus, the trial court found that Polk is not C.L.D.'s biological father, and dismissed Polk's petition for custody of C.L.D.

On June 19, 2006, the trial court entered an "Amended Order" vesting Mother with sole legal and physical custody of C.L.D., and terminating Polk's visitation rights.[2] From this order, Polk now appeals.

On appeal, Polk argues that the trial court erred in finding that he was not C.L.D.'s legal father, despite the DNA test results, and in dismissing his petition for custody and terminating his other non-custodial parental rights. He argues that, after participating in twelve years of litigation over C.L.D. in which she never questioned his status as C.L.D.'s legal and biological father, Mother should be estopped from denying that he is C.L.D.'s father. Given C.L.D.'s bond with Polk, Polk's wife and his extended family, Polk contends that the trial court's decision should be reversed.

We review the juvenile court's findings of fact *de novo* on the record, presuming these findings to be correct unless the evidence preponderates otherwise. ***Kendrick v. Shoemake***, 90 S.W.3d566, 570 (Tenn. 2002); ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984); Tenn. R. App. P. 13(d). We review issues of law *de novo*, with no such presumption of correctness. ***Kendrick***, 90 S.W.3d at 569-70; Tenn. R. App. P. 13(d).

The trial court had before it Polk's motion to determine parentage, and Polk's petition asking the trial court to change primary custody of C.L.D. from Mother to him. Mother's earlier petition to revoke Polk's visitation had been resolved. Thus, we review the trial court's action within that procedural framework.

This Court has considered numerous cases in which the putative father seeks DNA testing, or has obtained DNA testing, with the intent to sever his legal parental relationship with the child at issue. ***See, e.g., Coppage v. Green***, No. W2006-00767-COA-R3-JV, 2007 WL 845909 (Tenn. Ct. App. Mar. 21, 2007); ***State ex rel. Taylor v. Wilson***, No. W2004-00275-COA-R3-JV, 2005 WL 517548 (Tenn. Ct. App. Mar. 3, 2005); ***White v. Armstrong***, No. 01A01-9712-JV-00735, 1999 WL 33085 (Tenn. Ct. App. Jan. 27, 1999); ***Richards v. Read***, No. 01A01-9708-PB-004540, 1999 WL 820823 (Tenn. Ct. App. July 27, 1999). This case presents the converse. In response to Mother's questions regarding his parentage, Polk voluntarily agreed to DNA testing. Apparently dismayed when the DNA test indicated that he is not C.L.D.'s biological father, Polk nevertheless seeks to be

[2]The order does not address Polk's child support obligation.

declared C.L.D.'s legal father. The record contains no indication of the identity of C.L.D.'s biological father, and Polk's assertion that he is the only father C.L.D. has ever known does not appear to be in dispute.

Polk cites no caselaw on point as to the issues in this appeal, and we have found none.[3] However, a decision by our Supreme Court in ***In re: T.K.Y.***, 205 S.W.3d 343 (Tenn. 2006), is instructive.

In ***T.K.Y.***, the biological mother of the child at issue, Mrs. Y., engaged in an extramarital affair with Mr. P., while married to Mr. Y. ***Id.*** at 346. After the child was born, the mother remained married to Mr. Y. Eventually, Mr. P. filed a petition with the juvenile court to establish his parentage of the child. The mother and Mr. Y. filed a counter-petition seeking to have Mr. Y. declared the legal father of the child and seeking to terminate Mr. P.'s parental rights. A subsequent DNA test showed that Mr. P. was the child's biological father. ***Id.***

At the trial on Mr. P.'s parentage petition, the mother and Mr. Y. asserted that, despite the results of the DNA test, Mr. Y. should be declared the child's legal father because he was married to the mother and held the child out to the world as his natural child. The juvenile court found that Mr. P. was the child's father and set support and visitation. ***Id.*** at 347-48.

The mother and Mr. Y. appealed. The Court of Appeals found that, under Tennessee Code Annotated § 36-2-304(a), both Mr. Y. and Mr. P. had a rebuttable statutory presumption of parentage. Mr. Y. was presumed to be the father because he was married to the mother when the child was born, and had received the child into his home and held the child out to the world as his natural child. T.C.A. § 36-2-304(a)(1), (4). Mr. P. enjoyed a statutory presumption of parentage by virtue of the DNA test results. T.C.A. § 36-2-304(a)(5). According both presumptions equal weight, the Court of Appeals considered the best interests of the child and resolved the dispute in favor of Mr. Y. Mr. P. then appealed.

The Tennessee Supreme Court accepted the appeal to consider the issue. Framing the analysis, the Court stated:

> The determination of the child's legal father is a two-step process. First, we look to the parentage statutes, Tennessee Code Annotated sections 36-2-301 to -322, to determine the child's father. Then, we look to the adoption and termination statutes to determine whether the parentage father is also the legal father. ***See, id.*** §§ 36-1-101 to-142.

Id. at 349. The Court acknowledged that section 36-2-304 does not indicate that one method of ascertaining paternity is preferred over another, but cautioned that the statute had to be read in the view of the entire parentage statutory scheme. Emphasizing that "the very point of the parentage

[3]Mother made no appearance in this appeal.

statute is to determine the biological father of a child," the Court noted that the parties did not dispute that Mr. P. was the child's biological father. Thus, the Court held, "[u]nder the parentage statutes, because Mr. P. is [the child's] biological father, he is the child's father, as defined in the parentage statute." ***Id.*** at 351.

Going on to consider the adoption and termination statutes, the Court observed that, under these statutes, "the biological father is not automatically the legal father of a child." ***Id.*** at 352. Acknowledging that the adoption and termination statutes appeared to give preference to a man in Mr. Y.'s situation, the Court nevertheless held that, "in light of the constitutionally-protected rights of biological parents, . . . our view is that the rights of the biological father are superior." ***Id.*** As between the biological father and "another would-be father," the Court held that "[o]nce the biological father has established his paternity, his constitutionally-protected fundamental right to parent his child vests and he is the legal father." ***Id.*** Thus, the Court held that Mr. P. was the child's legal father. ***Id.***

Of course, the facts in ***In re T.K.Y.*** differ in significant respects from the facts in the case at bar. An important difference is that the instant case does not pit the rights of the biological father against "another would-be father." The only parties to this appeal are Polk and Mother.[4] Regardless, ***T.K.Y.*** sheds some light on our analysis of the trial court's decision on Polk's petitions.

Polk urges this Court to consider ***State of Tenn. ex rel. Russell v. West***, 115 S.W.3d 886 (Tenn. Ct. App. 2003) (perm. app. denied Sept. 2, 2003), in which the mother's former husband filed a post-divorce petition for genetic testing and to determine the parentage of the child. The former husband sought to terminate his legal obligation to support the child financially. The trial court permitted genetic testing, which excluded the ex-husband as the child's biological father. The trial court then terminated the ex-husband's obligation to provide financial support for the child. The State, on behalf of the mother, appealed.

On appeal, the Court of Appeals reversed. The appellate court emphasized that the ex-husband was aware when he married the mother that the child might not be his, but nevertheless waited until many years after the parties divorced to seek to have his parentage determined. Under these circumstances, the Court held, the trial court abused its discretion in permitting genetic testing and in allowing the ex-husband's parentage petition to proceed. ***Id.*** at 891.

The Court of Appeals also held that the ex-husband's parentage petition was barred by the doctrines of waiver and *res judicata*. It noted that the ex-husband could have raised the issue of his paternity in the divorce proceedings, but failed to do so, and the divorce-related orders clearly identified the ex-husband as the father. Thus, because the ex-husband was aware prior to the

[4]We note that the Tennessee Supreme Court in ***Osborn v. Marr***, 127 S.W.3d 737, 741 (Tenn. 2004), held that, under the parental termination statutes, the biological mother did not have standing to seek termination of the biological father's parental rights.

marriage that he might not be the child's father but nevertheless failed to raise the issue until many years after the divorce, he waived the issue and the issue was *res judicata*. ***Id.*** at 892.

Polk argues that, like the ex-husband in ***State ex rel Russell v. West***, Mother was aware from the outset that Polk might not be C.L.D.'s biological father but failed to raise the issue until C.L.D. was twelve years old. However, there are important distinctions in this case. First, the DNA testing in this case may have been prompted by Mother's questioning of Polk's paternity, but it occurred pursuant to an agreed order. Thus, Polk cannot argue that the trial court erred in permitting the DNA test. Second, the only indication in the record of Mother's position is the statement in the January 11, 2006 "Agreed Order" that "Mother now questions the paternity of this child." Because Polk agreed to the DNA test, he cannot now argue that Mother waived the issue of C.L.D.'s biological parentage.

Nevertheless, Polk maintains that, in view of the twelve years of litigation over C.L.D. in which Mother did not question Polk's status as C.L.D.'s legal father, the trial court should have held that she is now estopped from doing so. Indeed, in the case at bar, as in ***State ex rel. Russell v. West***, earlier orders (and pleadings filed by Mother), clearly refer to Polk as C.L.D.'s legal father. In ***West***, the Court concluded that, in light of such earlier orders in litigation between the parties, the issue of the identity of the child's legal father was *res judicata*. ***West***, 115 S.W.3d at 890, 892. In this case, however, Mother did not seek to terminate Polk's parental rights or his right to visitation with C.L.D., so we need not reach the issue of whether Mother was estopped from doing so.[5] In the proceedings below, Mother sought no relief. The only requests for relief pending before the trial court were Polk's parentage petition and his custody petition.

First we consider the trial court's ruling on Polk's parentage petition. Prior to the DNA test, Polk would have been presumed to be C.L.D.'s legal father, pursuant to Tennessee Code Annotated § 36-2-304(a)(4), in that Polk received C.L.D. into his home and openly held C.L.D. out as his natural child. T.C.A § 36-2-304(a)(4) (2005). This presumption, of course, was rebutted by the results of the DNA test. Under ***In re T.K.Y***, it is clear that, "under the definition of 'father' in the parentage statute, whomever is the *biological* father of a child is the child's father." ***In re T.K.Y.***, 205 S.W.3d at 350 (emphasis in original). Thus, we cannot find that the trial court below erred in holding that Polk "is not the biological father" of C.L.D. That holding correctly resolved Polk's parentage petition.

We next consider the trial court's disposition of Polk's custody petition. At the hearing below, the trial court heard no evidence, and apparently dismissed Polk's custody petition based primarily on the results of the DNA test. While the fact that Polk is not C.L.D.'s biological father is an important consideration, that fact alone does not preclude him from filing a custody petition. The juvenile courts regularly hear custody petitions filed by family members such as grandparents, aunts or uncles, or by third parties who have exercised physical custody of a child. ***See, e.g., Carr***

[5]The parental termination statutes "are not concerned solely with identifying a child's biological father." ***In re T.K.Y.***, 205 S.W.3d at 351.

v. McMillan, No. M2007-00859-COA-R3-CV, 2008 WL 2078058 (Tenn. Ct. App. May 14, 2008); ***In re M.L.P.***, No. W2007-01278-COA-R3-PT, 2008 WL 933086 (Tenn. Ct. App. Oct. 11, 2007). Here, it is undisputed that Polk has been a parental figure and sometimes custodian of C.L.D., and was in a position to bring to the juvenile court's attention concerns regarding C.L.D. Indeed, Polk's petition makes serious allegations about Mother's care of C.L.D., including assertions that Mother fails to provide C.L.D. with adequate food, housing, and supervision, and that Mother drinks to excess and verbally abuses C.L.D. Despite the seriousness of Polk's allegations and the fact that the record demonstrates that Mother has been an unstable parent during much of C.L.D.'s childhood, the trial court's Statement of the Evidence states that "no evidence was taken" at the hearing.

Moreover, in the Statement of Evidence, the trial court states that, in addition to DNA test results, an alternate basis for its dismissal of Polk's custody petition was that "Tennessee is not the home state of the child," an apparent reference to the Uniform Child Custody Jurisdiction and Enforcement Act, Tenn. Code Ann. §§ 36-6-201 *et seq.* It is true that Mother and C.L.D. are now living in Cincinnati, Ohio. However, the Tennessee juvenile court, having acquired jurisdiction over C.L.D. as a dependent and neglected child, retains jurisdiction until there is a valid transfer of jurisdiction to Ohio or other termination of jurisdiction. ***See*** Tenn. Code Ann. § 36-6-217 (a) (Supp. 2007) (regarding the residence of a "person acting as a parent.") The record contains no request to transfer or terminate the juvenile court's jurisdiction.

In addition, the trial court went beyond addressing Polk's request for custody, and modified the November 4, 2004 order which granted primary custody to Mother and granted Polk visitation and other rights of a non-custodial parent. The record, however, does not evidence any request for modification or other relief from Mother or any other party. Mother's earlier petition to revoke Polk's visitation had been denied, and this holding was not appealed. Moreover, there was no other "would-be father" before the trial court. ***Id.*** at 352. Despite these facts, the trial court awarded Mother sole legal and physical custody of C.L.D. and stripped Polk of any right to visitation with C.L.D. or other non-custodial parental rights. In view of the fact that the record contains no pending request for relief from the existing custody/visitation order by Mother or any other party, we must conclude that the trial court erred in, *sua sponte*, divesting Polk of any rights whatsoever related to C.L.D.

We recognize, of course, that Mother is C.L.D.'s biological parent and Polk is not. We hold only that, given the procedural posture of the case, the trial court erred in dismissing Polk's custody petition without hearing proof on the allegations regarding Mother's care of C.L.D., and in terminating Polk's right to visitation and other non-custodial parental rights in the absence of any request for such relief from Mother.

Therefore, we affirm the trial court's finding that Polk is not C.L.D.'s biological parent. We reverse the trial court's dismissal of Polk's custody petition and remand the cause for further proceedings.

The decision of the trial court is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this Opinion. Costs of this appeal are taxed against Appellant Cornelius Lavaughn Polk, and his surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE